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No. 87-776

In The
Supreme Court of the United States
October Term, 1987

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TRANSPORTATION COMMUNICATIONS UNION,
Petitioner,

v.

THE BALTIMORE AND
OHIO RAILROAD COMPANY,
Respondent.

—o—

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

—o—

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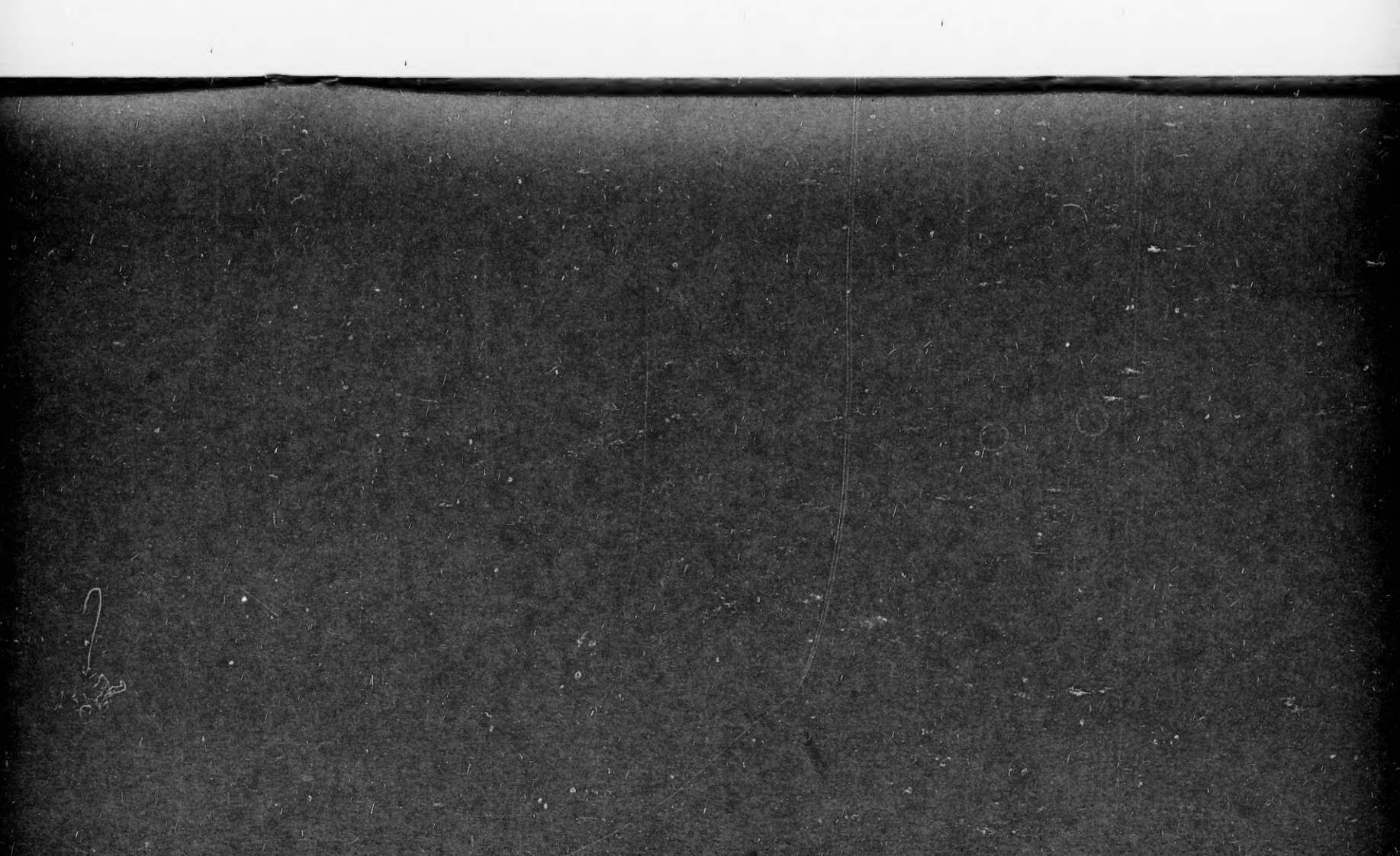

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT, BY COMPLETELY IGNORING CRITICAL CONTRACT TERMINOLOGY, WHICH REQUIRED THAT AN AWARD BE MADE IN FAVOR OF THE RESPONDENT, THE NATIONAL RAILROAD ADJUSTMENT BOARD RENDERED A DECISION WHICH DID NOT DRAW ITS ESSENCE FROM THE PARTIES' COLLECTIVE BARGAINING AGREEMENT, AND THEREBY EXCEEDED ITS JURISDICTION.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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RELEVANT STATUTORY PROVISIONS

Railway Labor Act § 3, 45 U.S.C. § 153 First(q), provides:

> (q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in

a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States District Court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order to the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

SUMMARY OF ARGUMENT

Although this Court has stated that the standard of judicial review established by the Railway Labor Act is a narrow one, it has never held that decisions of the NRAB are beyond all judicial review, or that the federal courts must uphold every award, no matter how egregious. An NRAB award may be set aside for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, if an award is wholly baseless

and completely without reason, if it is actually and indisputedly without foundation in reason or fact, or if it fails to draw its essence from the collective bargaining agreement.

This Court has already construed the "jurisdictional" provision of 45 U.S.C. § 153 on several occasions. The lower federal courts need no further guidance concerning its meaning. The decision in this case did nothing more or less than apply well recognized principles. The Fourth Circuit explicitly recognized and applied the prior decisions of this Court which limit the role of federal courts in reviewing NRAB awards. Confining itself within those narrow limits, the Court of Appeals properly held that, even though a labor contract is a generalized code to govern the myriad cases which the draftsman cannot anticipate, this generalized focus does not permit an arbitrator to rewrite the provisions of the collective bargaining agreement. The decision in this case was in full conformity with all of the prior holdings of this Court.

The decision in *Clinchfield Coal,* upon which both the trial court and the Fourth Circuit relied, held that where "the arbitrator fails to discuss critical contract terminology, which terminology might reasonably require an opposite result, the award cannot be considered to draw its essence from the contract." This holding is fully consistent with the long series of federal cases which have held that an arbitrator may not re-write a labor contract, and that if an arbitrator does not follow the express terms of the agreement, his ruling cannot stand. No conflict exists among the circuits which must be resolved by this

Court. Full review of the Union's petition should thus be denied.

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STATEMENT OF THE CASE

On June 28, 1984, a panel of the National Railroad Adjustment Board (NRAB), chaired by Referee Herbert Fishgold, issued decisions in six cases, finding that The Baltimore & Ohio Railroad Company (Railroad) had violated its collective bargaining agreement with the Brotherhood of Railway, Airline and Steamship Clerks, now the Transportation Communications Union (TCU), because yardmasters rather than clerks tore off and separated five-part switch lists[1] received at railroad yards on teletype printers. Though the task takes just "seconds to perform", and is incident to the yardmasters' other duties, Referee Fishgold ordered that the Railroad pay some sixty individual claimants for three hours' work, for each day on which yardmasters tore off switch lists, a sum approaching $3,000,000 for *past* conduct alone.

The same day, June 28, 1984, another NRAB panel, chaired by Referee Robert Silagi, issued a decision in an

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1. Switch lists are simply compiled lists of railroad cars, with directions concerning their combination for future use. These lists are prepared by clerks, but are used by yardmasters. Incident to their other duties, the yardmasters have been required to tear off the switch lists which they receive for use in their employment, and, because these new printers use multipart paper, since 1971 they have also been required to separate each of the four or five parts of the printer paper from one another. The time consumed in tearing off and separating each such switch list is a matter of seconds. The total time involved in this activity is less than 5 minutes per day.

identical case, brought by TCU on behalf of two individual claimants, finding that the Railroad had *not* violated its collective bargaining agreement with TCU by assigning to yardmasters the task of tearing off switch lists teletyped to Railroad yard office printers.

Beginning in 1974, the Railroad opened Terminal Service Centers at various locations in its system. When these Centers were opened, various yard and agency personnel, including a number of clerical personnel, were moved from railroad yards into centralized data processing offices. This centralization resulted in the creation of a number of new clerical positions in the Centers, and left only yardmasters at the Railroad's yards. As part of this centralization, printers were placed in an additional number of yardmasters' offices. The purpose was to permit yardmasters to receive switch lists electronically from clerical employees who entered switch list data at a Center in the same city. All such transmissions to yardmasters' offices were originated and received in the same city. In virtually every case, clerical positions which existed in yardmasters' offices were abolished, and new clerical positions were created in Centers for the affected clerical employees.[2]

In December 1975, long after yardmasters began to tear off and separate switch lists, TCU began to submit claims to the Railroad contending that the Railroad had violated Rules 1 and 67 of the parties' 1973 collective bar-

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2. In addition, as a result of this centralization, in or about 1976, the Railroad also installed "telecopier" facsimile equipment at a number of Terminal Service Centers and corresponding yardmasters' offices in the same city. Because of the unreliability of this facsimile equipment, its use was discontinued after a short time. This limited use of facsimile equipment, however, is also part of the subject matter of the current dispute.

gaining agreement (the Agreement), by assigning to yardmasters the task of tearing off and separating the switch lists received on the yardmasters' printers, incident to the yardmasters' other responsibilities.[3]

Rule 1 of the Agreement contains a description of the scope of work to be assigned to clerks and is commonly known as the "Scope Rule." In addition, however, Rule 1 recognizes the Railroad's right to assign various tasks to persons other than clerks, incident to their other duties, provided the total time devoted to such work does not exceed four (4) hours per day. These so-called "Incidental Work Rules" have been uniformly and consistently in the Railroad's agreements with the clerks' collective bargaining representatives since at least 1924. In relevant part, Rules 1 of the 1973 Agreement provides:

RULE 1

Positions and Employees Affected.

(a) These rules shall constitute an agreement between The Baltimore and Ohio Railroad Company . . . and the Brotherhood . . . and shall govern the hours of service, working conditions, and rates of pay of all employees engaged in the work of the craft or class of clerical, office, station and storehouse employees . . .

Assignment of Work.

(b) When the assignment of clerical work in an office, station, warehouse, freight house, store house, or yard, occurring within a spread of ten (10) hours from

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3. The Railroad also received claims, at or about the same time, contending that it had violated the same Rules by assigning to non-clerical personnel the task of picking up copies of such switch lists from baskets, after their receipt by facsimile equipment.

the time such clerical work begins, is made to more than one (1) employee not classified as a clerk, the total time devoted to such work by all such employees at a facility specified herein shall not exceed four (4) hours per day.

* * *

(c) When a position covered by this Agreement is abolished, the work assigned to same which remains to be performed will be reassigned in accordance with the following:

* * *

(2) In the event no position under this Agreement exists at the location where the work of the abolished position or positions is to be performed, then it may be performed by a Yardmaster, Foreman, or other supervisory employee, provided that less than four (4) hours work per day of the abolished position or positions remains to be performed; and further provided that such work is incident to the duties of a Yardmaster, Foreman or other supervisory employee.

* * *

(4) Work incident to and directly attached to the primary duties of another class or craft such as preparation of time cards, rendering statements or reports in connection with performance of duty, tickets collected, cars carried in trains, and cars inspected or duties of a similar character, may be performed by employees of such other craft or class.

* * *

Nothing in Rule 1 assigns the tearing off of switch lists and the separating of multi-part paper *exclusively* to clerical employees. That is the subject of this dispute.

Rule 67 of the Agreement deals generally with the use of teletype equipment, including the tearing off and sep-

arating switch lists, as a matter of *regular* clerical activity, *not* incident to other work. This rule now provides:

RULE 67

Printing Telegraph Machines.

Positions in telegraph or other offices requiring the operation of printing telegraph machines or similar devices that are used for transmitting and receiving, either or both, information, or communications of record, irrespective of title by which designated or character of services performed, shall be filled by employees coming within the scope of this Agreement.

Work in connection with the operation of transmitting, reperforating and receiving units, including tearing off and separating messages and reports, checking and correction of errors, shall be performed by employees covered by this Agreement.

Employees assigned as machine or device operators in relay offices shall not be required to punch or type longer than two (2) consecutive hours without a period of at least twenty (20) minutes on other work and not more than six (6) hours punching in any eight (8) hour period. Machines or device operators shall be allowed a short relief of ten (10) minutes in each four (4) hour period when requested. The remainder of the day may be assigned to other work under this Agreement.

None of the foregoing applies to the handling of train orders or Forms A or any communication with a train dispatcher.

The Agreement also includes Rule 75, which provides, in relevant part, that "Previous interpretations of Rules in this Agreement, where such Rules have been adopted un-

changed from previous Agreements, continue to apply unless in conflict with other Rules in this Agreement.''[4]

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4. While the historical roots and meaning of Rule 1 are unambiguous, the origin and purpose of Rule 67 are somewhat confusing, at least at first blush. It was this confusion, which TCU sought to engender by injecting Rule 67 into this matter, that sidetracked much of the proceedings before the NRAB.

Beginning in or about 1928, the Railroad entered into a series of agreements with the Order of Railroad Telegraphers (Telegraphers). Since the late 1930's, the Railroad has used printing teletype machines. Work on such machines was generally performed by Telegraphers. In 1945, the Railroad entered into a Memorandum of Understanding with the Telegraphers concerning the use of teletype machines.

At the same time as the Railroad signed this Memorandum of Understanding, the Railroad began to install teletype machines in some sales and yard offices, where non-telegraphers were employed. To ensure that no uncertainty would exist concerning application of the Memorandum of Understanding, in 1947, the Railroad and the Telegraphers executed a document interpreting the Memorandum.

The Telegraphers' agreement was reprinted in 1948, and the terms of the 1945 Memorandum of Understanding, together with the 1947 Interpretation, were included in the new agreement. At that time, clerical employees were covered by a separate collective bargaining agreement which contained no provision relating to handling of teletype transmissions.

Since 1948, the Railroad has had a consistent practice of allowing non-telegraphers to operate teletypes in the limited way that is the subject of this case.

As a result of increased mechanization, by 1955 the Railroad began negotiations with the Telegraphers to allow non-telegraphers to use teletype equipment to transmit train consist information and other reports from terminals located in one city to terminals located in other cities. In 1955, the Railroad and the Telegraphers reached an agreement, covering the use of teletype machines which appeared in a new collective bargaining agreement. The relevant provisions of the 1945 Memorandum of Understanding remained unaffected by the newly adopted procedures, and remained in effect throughout the Railroad, without change, until 1973.

(Continued on following page)

The claims requested compensation, on behalf of clerical employees who were already working in the Railroad's Terminal Service Centers. Many of the claims submitted by TCU acknowledged that the work sought by the clerks was "formally [sic] assigned to abolished positions," making the provisions of Rule 1 expressly applicable to those claims. Each of the claims submitted by TCU was denied by the Railroad and was handled in the usual manner, in accordance with 45 U.S.C. § 153 First (i). Because no adjustment of these disputes could be achieved in this manner, TCU petitioned the Third Division of the National Railroad Adjustment Board for review.

The first claim actually filed by TCU was the claim of one D.A. Emmerich, a clerical employee at the Railroad's Cincinnati Terminal who worked, together with a yardmaster, in a yardmaster's office. Unlike other claimants, Em-

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In 1971, the Railroad began to replace some of its old teletype machines with newer models. As a result of the Telegraphers' 1971 merger with BRAC, on the railroad industry reached a National Mediation Agreement, which allowed the Railroad to combine the clerks' and telegraphers' seniority rosters, and which permitted BRAC and the Telegraphers to select provisions from their separate agreements, without change in substance, and include those provisions in a single combined agreement. The railroads had no say in which provisions were selected.

By 1973, BRAC combined two agreements with the Railroad. The new agreement, like the previous Telegraphers' agreements, generally assigned to persons covered by the agreement work involving the use of teletype equipment, in Rule 67. However, like the previous clerks' agreements, the 1973 Agreement also contained Incidental Work Rules in Rule 1, which provided an exception to Rule 67, allowing the Railroad under certain circumstances to assign clerical work to persons other than clerks, incident to the other work of such non-clerks.

merich worked at a yardmasters' office at which all clerical positions were *not* abolished. Hence, the provisions of Rule 1(b) and 1(c) of the Agreement were not strictly applicable to Emmerich's case. The Emmerich claim was decided on July 22, 1980, by neutral referee Kasher, over the vigorous dissent of the carrier members of the NRAB.

Referee Fishgold was appointed on April 14, 1982, to adjudicate claims filed on behalf of the individual Appellants in this case. On May 18, 1982, TCU filed claims on behalf of two of its members employed at the Chicago Terminal. The Chicago claims were submitted to Referee Silagi shortly after April 1, 1983.

Both Fishgold and Silagi issued their decisions on June 28, 1984. Referee Silagi denied the Chicago claims, finding that Rule 1(b) of the 1973 Agreement, as well as the past practice of the Railroad and TCU, could not be ignored. Recognizing the "difficulty on this property in having contrary awards in different locations on the same issue on the same basic facts," Silagi felt "obliged" to reach a conclusion different from Referee Kasher in the Emmerich case, Award 22912, and stated:

> The origin of Rule 67 may not be disregarded. Said rule derived from the 1945 memorandum of understanding between B&O and Order of Railroad Telegraphers as later elucidated by the 1947 interpretation. It surfaced as Article 36 in the Telegraphers' agreement and then metamorphosed into Rule 67 in the 1973 Clerk-Telegrapher agreement. To be sure Article 36 consisted of 18 paragraphs while Rule 67 has but 4 paragraphs. Therefore Award 22912 held that the rule was not adopted unchanged on June 4, 1973. Yet a careful comparison of Article 36 with Rule 67 shows that the essential parts of the former are retained

in the latter. As noted earlier, obsolete portions and those parts which were in conflict with other rules were deleted. That being the case we are compelled to construe Rule 67 in the light of Rule 75 which enjoins upon the parties the obligation to continue to apply previous interpretations in existence prior to June 4, 1973. In contract construction a reasonable interpretation should prevail over one which leads to harsh and unjust consequences, Public Law Board No. 2895, Award No. 2 (Lieberman).

It is alleged by the Carrier, and not denied by the Organization, that since 1948, 5-ply paper had been used for the transmission of switch lists at both towers in the Barr Yard and that yardmasters tore off and separated these switch lists. It was not until subsequent to 1973 that claims were made that such work belonged to clerks. Award 22912 states that had the parties wished to preserve prior agreements they should have done so specifically. But nothing in Rule 75 negates 25 years of an unabated, unchallenged practice, Award 20514 (Lieberman). The parties own conduct for a quarter of a century simply cannot be ignored, it is the best evidence that there was no intent to terminate this minimal work assignment to yardmasters. Had they so desired they could have easily expressed that intent. Rule 67 must be read as modified by Rule 75.

Without abandoning its position that the Organization failed to show exclusivity of the work in question and that past practice must be considered the Carrier argues that the remedy of 8 hours pay is not justified. Even the remedy of 3 hours' pay, as granted by Award 22912, is not warranted for tearing off and separating 5 pieces of paper, a task which takes but a few seconds. We agree with the Carrier. It is impossible to harmonize organized labor's legitimate demand for an honest day's wages for an honest day's work with a pay claim that has the earmarks of

a lottery. The record in this case does not reveal that claimant ever performed the work in question. *This Board is not inclined to award a clerk a windfall of 8 hours pay, or even 3 hours' compensation, for services not performed and which are incidental to the work of a yardmaster. Such a claim is clearly excessive, Award 18804 (Franden) and should be denied on this ground alone.*

Having given careful consideration to the entire record, the arguments and to the awards cited by the parties, *it is the opinion of this Board that the disputed work comes within the exception contained in Rule 1(b). For all the reasons stated above the claim is denied.*[5]

In contrast to Referee Silagi, Fishgold did not mention the provisions of Rule 1(b) in his decisions. Like Silagi, Fishgold recognized the "difficulty" in reaching contrary conclusions. However, Fishgold decided to rely on the Kasher decision in Award 22912, and rejected the Railroad's arguments concerning the meaning of Rules 67 and 75. Explicitly stating that he had not disregarded "the origin of Rule 67 nor the clear intent of Rule 75," Fishgold opined:

> While the Board is not persuaded that merely because Article 36 had 18 paragraphs and Rule 67 only had 4, that Article 36 was not adopted unchanged. The Board is persuaded that, when read in conjunction with Rule 75, the failure of the parties to specifically adopt in Rule 67 the distinction between "inter-city" and "intra-city" communications evi-

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5. See, Appendix at 11-12. Reaching this conclusion, Silagi did not need to note the differences between the Cincinnati employee, Emmerich, and the employees of the Chicago Terminal, whose claims Silagi considered.

denced by the 1945 Memorandum of Understanding, undermines the Carrier's contractual argument. While the Board can accept that certain obsolete provisions pertaining to Morse telegraph and restrictions which conflicted with other rules were deleted in Rule 67 without changing the meaning of Article 36, the Board cannot conclude that the failure to continue to identify a specific distinction between "intra-city" and "inter-city" communications means that Rule 67 was unchanged from Article 36.

* * *

Finally, in this regard, the Board does not accept the Carrier's further argument that the history and practice since 1948 of allowing Yardmasters in the Barr Yard to tear off and separate these switch lists without any claims by the Clerks until after 1973, constitutes an unabated, unchallenged practice, which Rule 75 cannot negate.

* * *

Having found that the claims are to be sustained, the question arises as to what is the appropriate remedy. As in Award 22912, the Organization seeks eight (8) hours pay for work that took just a few seconds to perform, albeit on repeated occasions. This Board agrees with Referee Kasher in Award 22912 that such a remedy is inappropriate. This Board further concludes that, as in Award 22912: "A more appropriate remedy is found in the parties' Call Rule—Rule 8. Under this rule Claimant(s) should be compensated three hours since the work performed was two hours or less." . . .[6]

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6. Rule 8 of the parties' 1973 Agreement provides, in relevant part, that "Except as provided in paragraphs (b) and (c) of this Rule, regularly assigned employees notified or called to per-

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On August 14, 1984, the Railroad filed a complaint, pursuant to the Railway Labor Act, 45 U.S.C. § 153 First (q) (RLA), seeking to review the six Fishgold awards. No similar complaint was filed by TCU to review the Silagi award. However, on September 21, 1984, TCU answered the Railroad's complaint and filed a counterclaim, petitioning the District Court to enforce the awards entered by the Fishgold panel. The Railroad answered the counterclaim and, on March 1, 1985, moved the Court for summary judgment. TCU filed its own motion for summary judgment on February 21, 1985.

On September 12, 1985, an initial hearing on the cross-motions for summary judgment was held before District Judge J. Frederick Motz. Demonstrating great care in exercising his jurisdiction under the RLA, Judge Motz wrote counsel for the parties on October 8 and again on November 18, 1985, requesting that they address in writing certain additional questions bearing on the decision. After counsel responded, an additional hearing on the motions was held on January 24, 1986.

Finding that the Fishgold panel had exceeded its jurisdiction, had rewritten the Agreement, and had contravened its essence and purpose, "by simply omitting one of

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form work not continuous with, before, or after the regular work period or on their designated rest days other than Sundays or specified holidays shall be allowed a minimum of three (3) hours for two (2) hours' work, or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis." The Rule continues to provide that "Regularly assigned employees who have completed their work period for the day and been released from duty, required to return for further service, may be paid as if on continuous duty."

its critical provisions", Judge Motz vacated the awards entered by the Fishgold panel. In addition, Judge Motz found that these awards were not compensatory, but punitive in nature, and that, "by awarding penalty pay the Fishgold panel was merely 'dispensing its own brand of industrial justice', rather than following the Agreement. As a result, the court granted the Railroad's motion for summary judgment and denied TCU's. TCU appealed to the United States Court of Appeals for the Fourth Circuit.

The Fourth Circuit affirmed. Fully recognizing "that the scope of review of an NRAB decision is among the narrowest known to law," and that such decisions may only be set aside under the three restricted circumstances set forth in 45 U.S.C. § 153 First (q), the Court applied well established principles:

> That the scope of review is highly restricted, however, does not mean that courts may never set aside an NRAB award. Awards may be set aside if they are wholly baseless and completely without reason, *Gunther v. San Diego and Arizona Railway Co.*, 383 U.S. 257 (1965); if they are actually and indisputedly without foundation in reason or fact, *Brotherhood of Railroad Trainmen v. Central Georgia Railway Co.*, 415 F.2d 403 (5th Cir. 1969); or if the NRAB decision fails to draw its essence from the collective bargaining agreement, *International Association of Machinists v. So. Pac. Transp.*, 626 F.2d 215 (9th Cir. 1980); *BRAC v. Kansas City Terminal Ry. Co.*, 587 F.2d 903 (8th Cir. 1978); *Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228 (5th Cir. 1970).
>
> The NRAB exceeds its jurisdiction when there is manifest disregard of the collective bargaining agreement, *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3rd Cir. 1969), or when an award fails to take into account any existing common law of the particular

plant or industry, *Norfolk Shipping & Dry Dock v. Local No. 684*, 671 F.2d 797 (4th Cir. 1982). A collective bargaining agreement is more than a contract, it is a generalized code to govern the myriad cases which the draftsman cannot anticipate. *United Steel Workers of America v. Warrior and Gulf N. Co.*, 363 U.S. 574 (1960). This generalized focus does not however, permit an arbitrator to rewrite the provisions of the collective bargaining agreement. *See, e.g., Mistletoe Express Service v. Motor Expressmens Union*, 566 F.2d 692 (10th Cir. 1977); *W.R. Grace & Co. v. Local Union 759*, 652 F.2d 1248 (5th Cir. 1981). Thus, this court has held that where an arbitrator fails to discuss, in his decision, critical contract terminology, which might reasonably require the opposite result, the award cannot be said to draw its essence from the contract. *Clinchfield Coal v. District 28, UMW*, 720 F.2d 1365 (4th Cir. 1983).

In the instant case, the NRAB panel noted that B&O had raised the Scope Rule issue but then the panel failed to provide any discussion or analysis of that issue. Even a cursory reading of the relevant sections of the Scope Rule would lead the reader to believe that those practices which BRAC now challenges are completely proper under the collective bargaining agreement. Because the NRAB panel has provided no explanation of either the Scope Rule provisions at issue here, or their applicability to the instant case, *Clinchfield Coal, supra,* requires that the panel's decision be vacated.

Because this holding conforms to the prior decisions of this Court, and because there is no conflict between the Fourth Circuit's decision in this case and the decisions of other circuits, TCU's petition for a writ of certiorari should be denied.

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REASONS FOR DENYING THE WRIT

I.

Although this Court has stated that the standard of judicial review established by the Railway Labor Act is a narrow one, *Union Pacific Railroad v. Sheehan*, 439 U.S. 89, 91 (1978), it has never held that decisions of the NRAB are beyond all judicial review, or that the federal courts must uphold every award, no matter how egregious.[7] To the contrary, this Court has construed the "jurisdictional" provision of 45 U.S.C. § 153 to require that NRAB awards be set aside if they are "wholly baseless and completely without reason," *Gunther v. San Diego & Arizona E. Ry. Co.*, 383 U.S. 257, 261 (1965), *cited in Sheehan, supra*, 439 U.S. at 93. Indeed, for a court to uphold a wholly baseless award would raise constitutional problems under Article III, which guarantees the right to judicial review. *See, Northern Pipeline Const. Co. v. Marathon Pipeline Co.*, 102 S.Ct. 2858 (1982).

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7. Here, as in *Clinchfield Coal, supra*, 720 F.2d at 1370, the Union has argued that the provisions of 45 U.S.C. § 153 foreclose all judicial review of arbitration. Here, as in *Clinchfield*, the Union's argument "goes too far." Judicial deference to arbitration does not grant *carte blanche* approval to any decision that an arbitrator may issue. *Piggly Wiggly Operators' Warehouse, Inc. v. Piggy Wiggly Operators' Warehouse Independent Truck Drivers Union, Local No. 1*, 611 F.2d 580, 583 (5th Cir. 1980); *Int'l Ass'n of Mach. v. Hayes Corp.*, 296 F.2d 238, 243 (5th Cir. 1961). The integrity of the NRAB arbitration process and the public interest in having management-labor disputes resolved without unnecessary judicial involvement is fully protected by the limited standard of review described by this Court in *Gunther, Sheehan* and similar cases, as well as the *Steelworkers Trilogy*, upon which *Clinchfield* relied. *See, Clinchfield*, 720 F.2d at 1370.

The NRAB, like an arbitrator, is "confined to interpretation and application of the collective bargaining agreement; [it] does not sit to dispense [its] own brand of industrial justice." *See, United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *United Food & Commercial Workers, Local No. 222 v. Iowa Beef Processors, Inc.*, 683 F.2d 283, 285 (8th Cir. 1982). While an arbitrator or the NRAB "may of course look for guidance from many sources . . . his award is legitimate only so long as it draws its essence from the collective bargaining agreement. *When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.*" *Enterprise Wheel, supra*, 363 U.S. at 597 (emphasis added).

Properly construing the "jurisdictional" provision of 45 U.S.C § 153 First (q), the lower courts have repeatedly held, without question by this Court, that an NRAB award may be set aside "for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the divisions jurisdiction," if an award is "actually and indisputedly without foundation in reason or fact," *Bhd. of R.R. Trainmen v. Central of Ga. Ry. Co.*, 415 F.2d 403, 410 (1969); or if it fails to "draw its essence from the collective bargaining agreement." *Id.*, 415 F.2d at 412. *See, also, Int'l Ass'n of Mach. v. So. Pac. Transp.*, 626 F.2d 715, 717 (9th Cir. 1980); *Bhd. of Ry. Airline & Steamship Clerks v. Kansas City Terminal Ry. Co.*, 587 F.2d 903, 906 (8th Cir. 1978); *Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228, 233-34 (5th Cir. 1970); *Koloedey v. Mutual Beneficial Ass'n, etc.*, 526 F.Supp. 1158, 1161 (D. Del. 1981); *U.T.U. v. Pittsburgh*

Charters & Y. Ry. Co., 353 F.Supp. 1305, 1306 (W.D. Pa. 1973).

The NRAB acts outside its jurisdiction when there is "manifest disregard of the agreement", *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3rd Cir. 1969); or when an award fails to "take into account any existing common law of the particular plant or industry." *Norfolk Shipbuilding & Drydock v. Local No. 684*, 671 F.2d 797, 799-800 (4th Cir. 1982). Arbitrators have frequently recognized restrictions on their own powers and have acknowledged that they may not re-write the provisions of the contract upon which the parties have agreed. *See, e.g., Schotts Bakery, Inc.*, 69-1 ARB ¶ 8118, at 3397; *Wilner Wood Company*, 69-2 ARB ¶ 8734, at 5498 and *Champion Papers, Inc.*, 69-1 ARB ¶ 8341, at 4168. Similarly, the federal courts have held that an arbitrator may not re-write a labor contract. *See, e.g., Int'l U. of Operating Eng., Local No. 9 v. Shank-Artukovich*, 751 F.2d 364, 366 (10th Cir. 1985) (if the arbitrator does not follow the express terms of the agreement, his ruling cannot stand); *Gen'l Drivers, Warehousemen v. Hays & Nicoulin*, 594 F.2d 1093, 1094 (6th Cir. 1979); *Detroit Coil v. Int'l Ass'n of Mach.*, 594 F.2d 575, 579 (6th Cir. 1979) (an arbitrator is without authority to disregard or modify plain and unambiguous provisions of an agreement); *Monongahela Power Co. v. Local No. 2332, IBEW*, 566 F.2d 1196, 1199 (4th Cir. 1976) (an arbitrator is without authority to disregard or modify plain and unambiguous provisions); *Mistletoe Exp. Serv. v. Motor Expressmens Union*, 556 F.2d 692, 695 (10th Cir. 1977) (an arbitration award will not be upheld when it contravenes the express language of the labor contract); *Timken Co. v. Local No. 1123*,

United Steel Wrkrs., 482 F.2d 1012, 1015 n.2 (6th Cir. 1973) ("It is axiomatic that if the arbitrator undertook to, in effect, amend the contract, to substitute his own discretion for that of the parties or to dispense 'his own brand of industrial justice,' the enforcement of the award must be denied."); *Textile Workers Union v. American Thread Co.*, 291 F.2d 894, 899 (4th Cir. 1961).

The Union has sought to manufacture confusion from this consistent line of federal cases, which have faithfully applied the clear and unambiguous holdings of this Court. While citing both *Sheenan* and *Gunther*, TCU has suggested that this Court has not yet construed the "jurisdictional" provision of 45 U.S.C. § 153, and that "the court of appeals would have been less likely to reach the result it did [in this case] . . . if it had been bound by a decision of this Court definitively construing the dispositive statutory language." *Petition*, at 13, 18. The Union's argument only reflects its dissatisfaction with the result which the Fourth Circuit did reach in this case. As this Court held in *Gunther*, and repeated in *Sheehan*, and as the Fourth Circuit recognized in this case, the "jurisdictional" provision of 45 U.S.C. § 153 "means just what it says." *Id.*, 439 U.S. at 93. Contrary to TCU's suggestions, this Court has already construed the "jurisdictional" provision of 45 U.S.C. § 153 on several occasions. The lower federal courts need no further guidance concerning its meaning.

The decision in this case did nothing more or less than apply well recognized principles. The Fourth Circuit explicitly recognized and applied the prior decisions of this Court which limit the role of federal courts in reviewing NRAB awards. Confining itself within those narrow limits,

the Court of Appeals nevertheless properly concluded that these limitations upon the federal courts' scope of review do not mean that courts may never set aside an NRAB award. It held that, even though a labor contract is a generalized code to govern the myriad cases which the draftsman cannot anticipate, this generalized focus does not permit an arbitrator to rewrite the provisions of the collective bargaining agreement. The Fourth Circuit appropriately concluded that, even under this Court's most restrictive rulings, awards may be set aside if they are wholly baseless and completely without reason, if they are actually and indisputedly without foundation in reason or fact, or if they fail to draw their essence from the collective bargaining agreement. *See,* Petitioner's Appendix C, at 7a-9a. In short, the decision in this case did not conflict with the opinions of this Court dealing with judicial review of NRAB awards. Rather, that decision was in full conformity with *all* of the prior holdings of this Court.

II.

The legislative history of 45 U.S.C. § 153 establishes that Congress intended for the courts to exercise the same authority to review NRAB decisions which apply to review of arbitration awards. *See, Central of Ga.,* 415 F.2d at 410-12.[8] When considering 1966 amendments to the RLA,

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8. *See, also, Atchison, Topeka & Santa Fe Ry. Co. v. Buell,* 107 S.Ct. 1410, 1414, — U.S. — (1987) (referring to the NRAB and Public Law Boards as arbitration boards); *Andrews v. Louisville & Nashville Railroad Co.,* 406 U.S. 320, 322 (1972) (finding the record "convincing" that provisions of the RLA "dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field"); and *Gunther, supra,* 382 U.S. at 263 (stating that the Court has given NRAB decisions "the same finality that a decision of arbitrators would have"). In *Cen-*

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the *Central of Ga.* court noted, the Senate Labor and Public Welfare Committee stated that the grounds for review of NRAB awards "should be limited to those grounds commonly provided for review of arbitration awards." The Committee continued:

> The committee gave consideration to a proposal that the bill be amended to include as a ground for setting aside an award "arbitrariness or capriciousness" on the part of the Board. The committee declined to adopt such an amendment out of concern that such a provision might be regarded as an invitation to the courts to treat any award with which the court disagreed as being arbitrary or capricious. *This was done on the assumption that a Federal court would have the power to decline to enforce an award which was actually and indisputedly without foundation in reason or fact, and the committee intends that, under this bill, the courts will have that power.* The limited grounds for judicial review provided in H.R. 706 are the same grounds that are provided in section 9 of the Railway Labor Act and also Public Law 88-108, which provided arbitration for the so-called work rules dispute. [1966] U.S. Code Cong. & Admin. News, p. 2287.

Central of Ga., 415 F.2d at 410.

Applying these Congressionally mandated standards, the courts have set aside the decisions of the NRAB or arbitrators when an award has ignored clear and express

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tral of Ga., supra, the court quoted the Senate Report concerning the 1966 amendments to the RLA, as follows: "Also, because the National Railroad Adjustment Board has been characterized as an arbitration tribunal by the courts, the grounds for review should be limited to those grounds commonly provided for review of arbitration awards." *Id.*, 416 F.2d at 410. The Senate Report thereafter quoted the three grounds for review of NRAB awards set forth in 45 U.S.C. 153.

contractual provisions. Such awards have been set aside most often when an arbitrator has declined to sustain an employee's discharge from service, when such discharge was expressly contemplated by the applicable collective bargaining agreement. *See, e.g., Morgan Services, Inc. v. Local 323, etc.*, 724 F.2d 1217, 1222-23 (6th Cir. 1984); *General Drivers, Etc. v. Haynes and Nicoulin, Inc., supra; Mistletoe Express Service, supra,* 566 F.2d at 695 (overturning award that disregarded clear language allowing discharge without "progressive discipline" because award violated essence of agreement). *See, also, Amanda Bent Bolt Company v. International Union, Etc.*, 451 F.2d 1277, 1279-80 (6th Cir. 1971); *Truck Drivers and Helpers Union v. Ulry Talbert Company,* 330 F.2d 562 (8th Cir. 1964). *See, especially, Wilson v. Chicago & N.W. Transp. Co.*, 728 F.2d 963, 967 (7th Cir. 1984) (NRAB exceeded its authority by ignoring provisions mandating dismissal of charges for railroad's failure to comply with contractually specified time limits.)

However, the issue has also arisen outside the discharge area. *See, e.g., Sears Roebuck Company v. Teamsters Local Union No. 243,* 683 F.2d 154 (6th Cir.), *cert. denied,* 103 S.Ct. 1274 (1982) (arbitrator improperly rewrote contract disregarding express provision giving employer right to subcontract work); *Detroit Oil Company, supra,* 594 F.2d at 579-81 (disregard of contractual notice for grievances constitutes "clear failure to draw the essence of the award from the agreement"); *Industrial Mutual Association v. Amalgamated Workers,* 725 F.2d 406, 411 (6th Cir. 1984) (disregard of plain contract provision placing liability for shortages in accounts).

The decision in *Clinchfield Coal,* upon which both the trial court and the Fourth Circuit relied, held that where "the arbitrator fails to discuss critical contract terminology, which terminology might reasonably require an opposite result, the award cannot be considered to draw its essence from the contract." *Id.*, 720 F.2d at 1368-69. This holding is fully consistent with the long series of federal cases which have held that an arbitrator may not re-write a labor contract, and that if an arbitrator does not follow the express terms of the agreement, his ruling cannot stand. *See, e.g., Int'l U. of Operating Eng., Local No. 9 v. Shank-Artukovich, supra; Gen'l Drivers, Warehousemen v. Hays & Nicoulin, supra; Detroit Coil v. Int'l Ass'n of Mach., supra; Monongahela Power Co. v. Local No. 2332, IBEW, supra; Mistletoe Exp. Serv. v. Motor Expressmens Union, supra; Timken Co. v. Local No. 1123, United Steel Wrkrs., supra; Textile Workers Union v. American Thread Co., supra.*

Both the trial court and the Fourth Circuit decisions in this case found that Referee Fishgold was made fully aware of the unambiguous terms of Rules 1(b) and (c) of the 1973 agreement, by both parties' *ex parte* submissions to the NRAB. Rule 1(b) provides a general exception to all parts of the 1973 Agreement, applicable by the parties' practice only at facilities where no clerk is employed. Rule 1(b) authorizes the assignment of clerical work to persons other than clerks when, during a period of 10 hours after any such clerical work is begun by a non-clerk, the total amount of time devoted to clerical work by non-clerks is less than four (4) hours. Similarly, Rule 1(c) provides a general exception to all parts of the 1973 Agreement, ex-

pressly applicable when, as here, clerical positions are abolished. Rule 1(c) authorizes the assignment of clerical work to non-clerks, including yardmasters, where no clerical position exists at the location where the work of the abolished clerical position is to be performed, provided the clerical work is incident to the duties of the non-clerk and takes less than four (4) hours per day.

The referee was well aware that the claims which he considered were, in the Union's words, concerned with work which was "formally [sic] assigned to abolished positions." Application of Rules 1(b) and (c) was clear since the disputed work "took a few seconds to perform, albeit on repeated occasions," and, therefore, did not exceed four hours per day; because the work was performed by yardmasters incident to their duties; and since no positions covered by the 1973 Agreement exist at the locations where the claimed work of the abolished positions was performed. Nevertheless, as the trial court and the Fourth Circuit correctly found, the Fishgold decisions failed completely to mention, let alone consider, the terms of Rules 1(b) and (c).[9]

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9. TCU suggests that the trial court somehow ignored his proper role and conducted a *de novo* review of the Fishgold decisions, because the trial court sought diligently to understand the distinction between "major" and "minor" disputes under the RLA. *Petition,* at 6. Judge Motz readily expressed his own lack of familiarity with RLA concepts, stating "that is something which I really need advice of counsel who are knowledgeable in the area . . . ". In the succeeding minutes of the hearing quoted by TCU, however, Judge Motz clearly stated his understanding of his "job"—"to apply the law and I am, my mind is not—my mind is quite open as to what the final outcome of this case should be." Counsel for the Railroad clarified the distinction

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Notwithstanding TCU's efforts to distinguish this case, the Fishgold panel's decisions are like that of the arbitrator in *Clinchfield Coal, supra,* and similar cases. In *Clinchfield,* as here, the union argued that, by mentioning an issue, without further discussing it, in his list of questions raised by the employer, the arbitrator must have considered the employer's position and rejected it, although his decision did not develop his reasons in detail. *Id.,* 720 F.2d at 1369. There, as here, the union's argument was "wholly unsatisfactory for it would allow an arbitrator to shield his award simply by the ruse of stating an issue without discussing it." *Id.* This case, like *Clinchfield Coal,* is one where the arbitrator failed to discuss "critical contract terminology," which would necessarily lead to an opposite result, and where the arbitrator thus rendered an award which "cannot be considered to draw its essence from the contract." *Id.*

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between major and minor disputes under the RLA, a distinction which the court quickly grasped. Counsel for the Railroad then engaged in argument about the appropriate standards of review and their application in this case. Judge Motz indicated his complete understanding of the limits of his authority, stating, in response to counsel's argument, that if the arbitrator had to be cautious about "dispensing his own brand of industrial justice", the court had to be "even more cautious". Judge Motz added that "the fact that [he] think[s] its senseless is something that [he] had better examine [his] conscience very closely to think [he's] just not relating [sic] the contract or overturning the arbitrator's decision because of what [his] view is, right or wrong." While those remarks may show that Judge Motz "agonized" over the decision which he rendered, as the Union averred before the Fourth Circuit, they also show the great care which he brought to bear in reaching the correct result, and completely disprove the Union's contention that the trial court and the Fourth Circuit conducted a *de novo* review of the challenged Fishgold decisions.

By ignoring Rules 1(b) and 1(c) the Fishgold decisions did not simply commit "error", or contain some "ambiguity". *Petition,* at 11-12.[10] Rather, by ignoring "critical contract terminology", *Clinchfield Coal,* 720 F.2d at 1369, the Fishgold decisions showed a "manifest disregard of the agreement," *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F.2d at 1128; effectively "attempted to alter the existing agreement," *Wilson v. Chicago & N.W. Transp. Co.,* 728 F.2d at 967; and failed to "draw [their] essence" from the Agreement. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.,* 363 U.S. at 597; *Central of Ga.,* 415 F.2d at 412. As a result, as both the trial court and the Court of Appeals correctly found that, by ignoring Rules 1(b) and 1(c) of the parties agreement, the Fishgold panel exceeded the authority of the NRAB and violated the terms of the Railway Labor Act, within the meaning of 45 U.S.C. § 153 First (q).

In sum, the decision of the Fourth Circuit in this case did not conflict with the decisions of other Courts of Ap-

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10. Even a cursory review of Judge Motz' decision demonstrates that the District judge did not, as TCU contends, vacate the Fishgold decisions on the basis that the NRAB had misinterpreted the contract. Instead, Judge Motz' opinion rests on the obviously correct premise that Fishgold *ignored* Rule 1 and that "by ignoring Rule 1 the panel contravened the essence and purpose of the 1973 agreement." Hence, Judge Motz properly considered the reasons given by the referee, as well as evidence available to assist the court in determining whether the referee's award drew its essence from the Agreement. Such consideration does not violate any of the standards of review established by Congress and the courts. To the contrary, if Judge Motz had failed to make these determinations, he would have abdicated his judicial responsibility, in the words of Congress, "to decline to enforce an award which was actually and indisputedly without foundation in reason or fact . . ." [1966] U.S. Code Cong. & Admin. News, p. 2287, *quoted in Central of Ga.,* 415 F.2d at 410.

peals which have interpreted 45 U.S.C. § 153. To the contrary, both the decision of the trial court and the opinion of the Fourth Circuit were fully consistent with the decisions of other courts. No conflict exists among the circuits which must be resolved by this Court. Full review of the Union's petition should thus be denied.

CONCLUSION

For the foregoing reasons, the Respondent, the Baltimore & Ohio Railroad Company, respectfully submits that the decision of the United States Court of Appeals for the Fourth Circuit was correct, and that the Petition of the Transportation Communications Union for a Writ of Certiorari to review that decision should be denied.

Respectfully submitted,

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APPENDIX

NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24881
Docket Number CL-24747

THIRD DIVISION

Robert Silagi, Referee

PARTIES TO DISPUTE:

(Brotherhood of Railway, Airline and Steamship
(Clerks, Freight Handlers, Express and Station
(Employes
(
(Baltimore and Ohio Chicago Terminal Railroad
(Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood (GL-9630) that:

(1) Carrier violated, and continues to violate, Clerk-Telegrapher Agreement beginning with the claim date of June 1, 1981, when it caused and permits employees not covered by said Agreement to perform work and functions in connection with the operation of printing telegraph (teletype) machines and similar devices used for transmitting and receiving communications, including tearing off and separating message reports of cars, at Ashland Avenue and Halsted Street Towers; two (2) locations at Barr Yard, Chicago, Illinois and

(2) As a result of such impropriety, Carrier shall be required to compensate Clerk M. A. Gasper, Barr Yard, Chicago, Illinois, eight (8) hours pay commencing June 1, 1981, and continuing each subsequent date until the foregoing violations of the Agreement cease, and

(3) That Carrier shall also, because of its violative action, compensate Clerk F. Neilson, Barr Yard, Chicago, Illinois, eight (8) hours pay beginning June 1, 1981, and continuing each subsequent date until Carrier ceases to violate the Clerk-Telegrapher Agreement at Barr Yard, Chicago, Illinois, as heretofore described.

OPINION OF BOARD: The issue presented in this dispute is whether the tearing off and separating of 5-ply message reports of cars from teletype machines by yardmasters contravenes Rule 1—Scope, Rule 18—Installation of Machines or Rule 67—Printing Telegraph Machines. The relevant portions of said rules are quoted below.

"Rule 1—Positions and Employees Affected.

(a) These rules shall constitute an agreement between the Baltimore and Ohio Railroad Company, The Baltimore and Ohio Chicago Terminal Railroad Company, and The Staten Island Railroad Corporation and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees and shall govern the hours of service, working conditions, and rates of pay of all employees engaged in the work of the craft or class of clerical, office, station and storehouse employees, which shall include all employees formerly covered by clerical agreement effective July 1, 1921 (as revised December 15, 1969) as amended, and all employees engaged in the work of the craft or class of Transportation-Communication Employees, which shall include all employees formerly covered by the Transportation-Communication Agreements: The Baltimore and Ohio Railroad Company effective July 1, 1928, as revised June 16, 1960, as amended; The Baltimore and Ohio Chicago Terminal Railroad Company effective June

3, 1963, as amended; and The Staten Island Railroad Corporation effective August 1, 1959, as amended."

"Rule 1(b)—Assignment of Work

When the assignment of clerical work in an office, station, warehouse, freight house, store house, or yard, occurring within a spread of ten (10) hours from the time such clerical work begins, is made to more than one (1) employee not classified as a clerk, the total time devoted to such work by all employees at a facility specified herein shall not exceed four (4) hours per day."

"Interpretation of Rule 1(b)

The word 'employee' in Rule 1(b) means one in the employ of this Company, whether coming under the Scope of this Agreement, another agreement, or outside the Scope of any agreement."

"Rule 18—Installation of Machines.

(a) When and where new types of machines or mechanical devices of any kind are used for the purpose of performing work previously handled by such machines, coming within the Scope of this Agreement, sucuh work will be assigned to employees covered by this Agreement."

"Rule 67—Printing Telegraph Machines.

Positions in telegraph or other offices requiring the operating of printing telegraph machines or similar devices that are used for transmitting and receiving either or both, information, or communications of record, irrespective of title by which designated or character or services performed, shall be filled by employees coming within the scope of this Agreement.

Work in connection with the operation of transmitting, reperforating and receiving units, including tearing off and separating messages and reports, checking and

correction of errors, shall be performed by employees covered by this Agreement."

The Organization relies heavily upon Rule 67, second paragraph, which assigns to Clerks the work of "tearing off and separating messages and reports". Such language is, in the Organization's view, "explicit unambiguous, certain, definite and unequivocally clear", consequently it demands an absolute right to insist upon compliance with the Rule. Conflicting past practices are material and relevant in the interpretation and application of a contract only when its terms are ambiguous (Awards 21130—Blackwell; 18287—Dorsey; 18064—Quinn; and 14338—Perelson). Finally the Organization maintains that sustaining Award 22912 (Kasher), a case identical with the one at bar, is dispositive of the issue. It is, therefore, self evident that tearing off switch lists from printing teletype machines in Barr Yard and separating the 5-ply paper messages is work which must be done by Clerks and none others.

The Carrier's argument is three-fold: (a) that the Organization failed to sustain its burden of proving exclusive right to the work in question, (b) that even if such right exists, there is an exception under Rule 1(b), and (c) that Award 22912 (Kasher) has no precedential value.

To better understand the arguments of the parties the history of the dispute must be examined. A synopsis of the history follows:

Prior to the mid-1930's Morse key telegraph operators transmitted administrative messages on Carrier's sister railroad, the Baltimore and Ohio Railroad Company

(B&O). In the late 1930's printing teletype machines were installed. The operation of the machines was a completely new assignment. In 1945 B&O and Order of Railroad Telegraphers entered into a memorandum of understanding assigning such work to telegraphers. Section 5 of said memorandum is almost identical with the second paragraph of Rule 67, supra. About this time the Carrier began to install printing teletype machines in some of its B&O yard offices where non-telegraph employees used this equipment to transmit reports and messages. These reports and messages were transmitted from Yard and Sales offices to a relay office in the same terminal where telegraphers retransmitted this information to other terminals. At the B&O Cincinnati Terminal the Telegraphers claimed exclusive rights to operate the teletype machines. To avoid misunderstanding, in 1947 the parties executed an interpretation of their first memorandum. The parties agreed that:

> "This Memorandum of Understanding does not apply to intra-city communication by direct key-board teletype machines in offices where Morse telegraph has never been in use and the communication service prior to the installation of teletype was being handled by telephone or messenger.
>
> Where intra-city communication by machines referred to in the above Memorandum of Understanding is performed by other than employees coming within the Scope of the Telegraphers' Agreement, the business so handled except wheel reports, shall not be transmitted by reperforator tape to intra-city points."

In 1948 the B&O Telegrapher's Agreement was reprinted. The 1945 memorandum of agreement and its 1947

interpretation appeared as Article 31 of the new agreement.

In 1948 the Carrier installed printing teletype machines in the Yardmasters' Towers in Barr Yard. Such machines were also installed in the Barr Yard Office where non-telegraphers used them to transmit switch lists to the yardmasters at their towers in Barr Yard. At both towers yardmasters tore off the switch lists from the machines in their offices and separated the 5-ply papers. No dispute arose between Carrier and Telegraphers nor between Carrier and the Organization as to the right of yardmasters to do these tasks. At this time the telegraphers in Chicago Terminal were covered by a different working agreement than that governing employes on the B&O. Said agreement did not contain the equivalent of Article 31. Clerical employes on both properties were covered by the same working agreement which contained no rule whatever dealing with the handling of teletype transmissions.

In the mid-1950's Carrier installed teletype equipment in yard offices throughout its system. In 1955 Carrier and Telegraphers negotiated a revision of Article 31 to cover employes of the Carrier. The Telegraphers' agreement covering B&O employes was reprinted in 1960 with the 1955 revision of Article 31 appearing as Article 36 which reads in pertinent part:

> "Printing Telegraph Machines.
>
> (a-1) Positions in telegraph or other offices requiring the operation of printing telegraph machines . . . shall be filled by employees coming within the scope of the Telegraphers' Agreement . . . except as herein provided. In offices, other than telegraph offices, persons not coming within the scope of the Telegraphers'

Agreement may operate machines . . . for transmitting or receiving information directly to or from telegraph offices in the same terminal. Such persons may operate such machines . . . for transmitting information . . . or receiving information . . . to or from offices, other than telegraph offices when the information is confined to reports of the movement of cars to or service messages concerning transmission errors, corrections or modifications . . .

(e) Except as provided in paragraph a-1, work in connection with the operation of transmitting, reperforating and receiving units, including tearing off and separating messages and reports, checking and correction of errors, shall be performed by employees covered by the Telegraphers' Agreement. In emergency cases, individuals used for such service will not establish seniority."

In 1963 the agreement between Carrier and Telegraphers was reprinted. Article 36, above, appeared as Article 2 with two deletions not relevant hereto. After the 1955 agreement was extended to cover employees of the Carrier no complaint was made by the Brotherhood in regard to the use of yardmasters to tear off or to separate the switch lists sent to them by personnel in the Barr Yard office.

In 1966 Carrier installed a computer at Barr Yard which maintained a perpetual freight car inventory of all cars within defined limits at Chicago Terminal. Yardmasters continued to receive switch lists from Barr Yard office by teletype. In 1971 these machines were replaced by Kleinschmidt Receive Only Printers and in the following year Data Fax machines were added. Since then employes in the Barr Yard office have sent switch lists to

yardmasters by use of the Kleinschmidt and Data Fax machines.

In 1972, negotiations began regarding the consolidation of Clerk-Telegrapher work. The eventual result of such negotiations was the current consolidated Clerk-Telegrapher Agreement, effective June 4, 1973. Article 36 of the former B&O Telegraphers' agreement was incorporated into the consolidated agreement, however, deleted therefrom were certain obsolete provisions pertaining to Morse telegraph and restrictions which conflicted with other rules. The revised Article 36 appeared as Rule 67, reproduced above. In order to provide a continuum of interpretations of the rules extracted from former contracts the consolidated agreement of 1973 contains Rule 75:

> "This Agreement supersedes previous Collective Bargaining Agreements, and interpretations thereof, between the parties, and existing Circulars, Memoranda of Agreement and Letters of Agreement are cancelled unless otherwise agreed between the parties. Previous interpretations to Rules in this Agreement, where such Rules have been adopted unchanged from previous Agreements, continue to apply unless in conflict with other Rules in this Agreement. Effective National Agreements remain in effect unless, or until, changed in accordance with Railway Labor Act, as amended."

In 1974 Carrier began to open Terminal Service Centers at various locations throughout its system. In most cases these new data centers consolidated yard and agency personnel into one central point leaving only yardmasters in the individual yards. Wherever a Terminal Service Center was opened, Kleinschmidt Receive Only Printers were placed in the yardmasters' offices so that they could

receive switch lists. At each such location yardmasters tore off the lists and separated the copies. Thereafter Carrier began to receive claims that such work should be assigned to Clerks pursuant to Rule 67. Since the dispute could not be resolved on the property, the Organization progressed a December 1975 claim in the Cincinnati yard office and presented it to this Board for adjudication. The Board sustained the claim in Award 22912 (Kasher) which, however, reduced the claim of eight hours' pay "for work that took just a few seconds to perform" to a three-hour call.

The Organization argues forcefully that the merger of the Clerks' and Telegraphers' crafts in 1973 guaranteed to employes covered by the joint Clerk-Telegrapher agreement the exclusive right to perform all work in all offices involving teletype machines including tearing off and separating messages. The Organization acknowledges that hundreds of demands for eight hours' pay based upon claimed violations of Rule 67 were submitted and held in abeyance pending a decision in Award 22912. The Organization asserts that Carrier bargained in bad faith when it refused to honor Award 22912 and apply it to the pending identical claims. The Organization attacks Carrier's reference to former Telegraphers' Agreements with Carrier as outmoded for over 30 years. The Organization also claims that the disputes as to "communication work" over the years was between Clerks and Telegraphers and not with Yardmasters, nor have Yardmasters ever contended for such work. Moreover, the Organization points out that although the Railroad Yardmasters of America were named as an interested third party in the proceedings in the claim leading to Award 22912, the Yardmasters elected

not to participate in that case. Nor are the Yardmasters making any claim to the disputed work in the instant case. The Organization rejects the notion that any portion of the operation of a teletype machine, no matter how slight, may be splintered from the jurisdiction of the Clerks, citing Awards 1501 (Shaw) and 2282 (Fox).

The Carrier argues with equal vigor that Award 22912 must be overturned. The doctrine of stare decisis, says the Carrier, is not absolute and should not be followed when an award is palpably erroneous. The history of collective bargaining must be given due consideration. Past practice is an important element in disclosing how the parties themselves interpreted their agreement. In any event claimant's demand for 8 hours' pay is harsh and excessive.

Continuity in the interpretation of contract rules is highly desirable. Such interpretations should not be overruled without strong and compelling reasons, Public Law Board No. 1790, Award No. 98 (Dolnick). Award 22912 involved the Cincinnati Terminal of the Carrier. Nevertheless, there is no honest way to distinguish the decision in this dispute from that decision. The parties are the same, the agreement is the same and the facts virtually identical. Certainly there will be difficulty on this property in having contrary awards in different locations on the same issue under the same basic facts. But it is preferable in the overall interest of the parties to give the best direction to the parties, as this Board sees it, as to how the rule should be applied, rather than follow the precedent set in another award, particularly as that decision is recent and, therefore, could not have developed substantial precedent, Award 22024 (Ables). With due deference to

the distinguished referee who wrote the opinion in Award 22912 and to the members of this Board who concurred in his views, we feel obliged to reach a different conclusion for the following reasons:

The origin of Rule 67 may not be disregarded. Said rule derived from the 1945 memorandum of understanding between B&O and Order of Railroad Telegraphers as later elucidated by the 1947 interpretation. It surfaced as Article 36 in the Telegraphers' agreement and then metamorphosed into Rule 67 in the 1973 Clerk-Telegrapher agreement. To be sure Article 36 consisted of 18 paragraphs while Rule 67 has but 4 paragraphs. Therefore Award 22912 held that the rule was not adopted unchanged on June 4, 1973. Yet a careful comparison of Article 36 with Rule 67 shows that the essential parts of the former are retained in the latter. As noted earlier, obsolete portions and those parts which were in conflict with other rules were deleted. That being the case we are compelled to construe Rule 67 in the light of Rule 75 which enjoins upon the parties the obligation to continue to apply previous interpretations in existence prior to June 4, 1973. In contract construction a reasonable interpretation should prevail over one which leads to harsh and unjust consequences, Public Law Board No. 2895. Award No. 2 (Lieberman).

It is alleged by the Carrier, and not denied by the Organization, that since 1948, 5-ply paper had been used for the transmission of switch lists at both towers in the Barr Yard and that yardmasters tore off and separated these switch lists. It was not until subsequent to 1973 that claims were made that such work belonged to clerks.

Award 22912 states that had the parties wished to preserve prior agreements they should have done so specifically. But nothing in Rule 75 negates 25 years of an unabated, unchallenged practice, Award 20514 (Lieberman). The parties own conduct for a quarter of a century simply cannot be ignored, it is the best evidence that there was no intent to terminate this minimal work assignment to yardmasters. Had they so desired they could have easily expressed that intent. Rule 67 must be read as modified by Rule 75.

Without abandoning its position that the Organization failed to show exclusivity to the work in question and that past practice must be considered, the Carrier argues that the remedy of 8 hours' pay is not justified. Even the remedy of 3 hours' pay, as granted by Award 22912, is not warranted for tearing off and separating 5 pieces of paper, a task which takes but a few seconds. We agree with the Carrier. It is impossible to harmonize organized labor's legitimate demand for an honest day's wages for an honest day's work with a pay claim that has the earmarks of a lottery. The record in this case does not reveal that claimant ever performed the work in question. This Board is not inclined to award a clerk a windfall of 8 hours' pay, or even 3 hours' compensation, for services not performed and which are incidental to the work of a yardmaster. Such a claim is clearly excessive, Award 18804 (Franden) and should be denied on this ground alone.

Having given careful consideration to the entire record, the arguments and to the awards cited by the parties, it is the opinion of this Board that the disputed work comes within the exception contained in Rule 1(b). For all of the reasons stated above the claim is denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: /s/ Nancy J. Dever
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1984